

STATE OF MICHIGAN
COURT OF APPEALS

BEVERLY GROSTIC, Personal Representative of
the Estate of Gerald F. Grostic, and BEVERLY
GROSTIC, GERALD GROSTIC, JR., and JASON
GROSTIC, Individually,

Plaintiffs-Appellees,

v

AGCO CORPORATION, a Delaware Corporation,

Defendant/Cross-Defendant-
Appellant.

and

S+L+H, S.P.A., a foreign partnership,

Defendant/Cross-Defendant.

and

DIUBLE EQUIPMENT, INC.,

Defendant/Cross-Plaintiff

UNPUBLISHED
January 14, 2003

No. 218848
Livingston Circuit Court
LC No. 96-014968-NP

ON REMAND

BEVERLY GROSTIC, Personal Representative of
the Estate of Gerald F. Grostic, and BEVERLY
GROSTIC, GERALD GROSTIC, JR., and JASON
GROSTIC, Individually,

Plaintiffs-Appellees,

v

AGCO CORPORATION, a Delaware Corporation,

Defendant/Cross Defendant,

and

No. 218849
Livingston Circuit Court
LC No. 96-014968-NP

S+L+H, S.P.A., a foreign partnership,

Defendant/Cross-Plaintiff-Appellant,
and

DIUBLE EQUIPMENT, INC.,

Defendant/Cross-Plaintiff.

ON REMAND

Before: Holbrook, Jr., P.J., and Sawyer and Zahra, JJ.

ZAHRA, J. (*concurring in part and dissenting in part*).

I concur in the majority's conclusion that plaintiffs failed to establish claims of negligent infliction of emotional distress. However, I again dissent from the majority's conclusion that the trial court properly denied defendants' motion for JNOV. Plaintiffs failed to present evidence from which a jury could reasonably and logically conclude that defendants' alleged wrongful conduct was the cause of plaintiffs' injuries. I would reverse the judgment of the trial court and remand for entry of a judgment in favor of defendants.

The majority fails to identify specific evidence to support the conclusion that plaintiffs were injured as a result of 1) the failure to warn, or 2) a design defect of the PTO. Rather, the majority merely concludes that a jury could reasonably infer that had an alternative design or additional warning been provided, this accident would not have occurred. In order for a jury to conclude that causation occurred, the plaintiff carries the burden of producing substantial evidence establishing "but for defendant's conduct, the plaintiff's injuries would not have occurred." *People v Skinner*, 445 Mich 153, 164-165; 516 NW2d 475 (1994). Plaintiffs have failed to establish their burden of producing the necessary evidence.

The majority states that "[n]one of the tractor's warnings and operating instructions included a warning that an operator should always move the PTO lever to the "off" notch when disengaging the drive, and not rely on the lack of motion in the PTO indicating that the PTO had been disengaged. . . . [W]e conclude . . . sufficient evidence was presented to create a triable issue for the jury on whether such a warning would have prevented this tragic accident." Simply put, implicit in the majority's conclusion is the assumption that the PTO spontaneously engaged. If the PTO did not spontaneously engage, then leaving the PTO lever in the "off feather zone," short of the "off notch" could not be the cause of plaintiffs' injuries. However, as indicated in my prior dissenting opinion, *Grostic v AGCO Corp*, unpublished dissenting opinion of the Court of Appeals, issued May 4, 2001 (Docket Nos. 218848 & 218849), vacated 465 Mich 946; 639 NW2d 807 (2002), there was no credible evidence to support the theory of spontaneous engagement. In the absence of evidence to support the theory of spontaneous engagement, the failure to incorporate a warning instructing the operator to always extend the PTO lever to the off

notch could not be the cause of this fatal accident because the PTO would not have engaged the haybine.

The majority also states that “plaintiffs submitted substantial evidence from which a jury could infer that defendants knew or should have known of the *control lever’s propensity for harm*, and that there were at least three alternative designs that were available and relatively simple to implement at the time decedent’s tractor was built.” (Emphasis added.) However, the majority fails to identify what exactly was the “control lever’s propensity for harm.” The deficiency in the design alleged by plaintiffs is the lack of positive control. Stated differently, it is the lack of a design that would insure the lever disengages when not actually placed in the engaged position. However, this alleged failure could only constitute the cause of plaintiffs’ injuries if the PTO spontaneously engaged while in the “off feather zone.” Again, no competent evidence of spontaneous engagement was presented in this case. Therefore, the design of the PTO lever could not, as a matter of law, be the cause of plaintiffs’ injuries.

In my opinion, this case is indistinguishable from *Skinner, supra*, 445 Mich 153. Judgment should be entered for defendants.

/s/ Brian K. Zahra